Occupiers' liability and foreseeable risk of harm: Novakovic v Stekovic

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In brief — claimant fails to establish that risk of harm was foreseeable

In the case of *Novakovic v Stekovic*,[1] the NSW Court of Appeal has recently considered the requisite criteria for establishing whether a risk of harm was foreseeable such that precautions were warranted to avoid that risk eventuating.

The decision of the court below was upheld, finding that the appellant had not established that the risk of harm was foreseeable.

Incident at residential premises

The appellant, Mileva Novakovic, brought proceedings in the District Court against the respondents, Mr and Mrs Stekovic (her brother and sister in law) for injuries arising from an incident at their home on 19 January 2008.

Ms Novakovic had visited the home on a fortnightly basis for some two years. The Stekovic's owned a bull mastiff-kelpie dog, which was usually kept in the backyard of the premises. On this occasion, however, Ms Novakovic and three other relatives entered the home and found the dog sitting inside.

Unbeknown to Mr and Mrs Stekovic, Ms Novakovic had a fear of dogs. As she entered the house, the dog rose and approached her. In response, Ms Novakovic panicked and rushed out the front door, closing it behind her. As she turned, she slipped and fell on the wet surface outside.

Ms Novakovic required surgery for the injury she sustained and was off work for a period of six months. She later returned to work, but was only able to work on a part time basis for the course of the following year.

Duty of occupiers to protect claimant from foreseeable risks

The duty imposed on the Mr and Mrs Stekovic as the occupiers required them to protect Ms Novakovic upon entry onto the premises from any "not insignificant" risks which could reasonably be foreseen and avoided.

At common law, the duty is measured by what a reasonable person in the occupiers' position would do in response to the foreseeable risk: See *Hackshaw v Shaw*.[2] The measure is now prescribed by s 5B of the Civil Liability Act 2002 (NSW) (the Act).

Did the presence of a dog pose a foreseeable risk?

Section 5B of the Act provides a clear framework for the elements to be satisfied in establishing whether a risk of harm is foreseeable, such that precaution against that risk ought to be taken. It is imperative that the inquiry not be undertaken in hindsight but must always be answered prospectively, prior to the incident occurring — *Vairy v Wyong Shire Council*.[3]

The question is not what could have been done, but rather, would it have been reasonable for the occupiers to take those measures. Instead of looking at how Ms Novakovic came to sustain her injury, it is necessary to consider whether the occupiers were required to take any precautions, given that they had a dog in the house to which guests had been invited.

A duty is not breached merely because there are steps that could have been taken to avert the risk which actually materialised: see *Thornton v Sweeney*.[4] Did the presence of the dog in the house pose a foreseeable and not insignificant risk in the circumstances? Only if that question is answered in the affirmative is one required to consider what a reasonable person would do by way of response to that risk.

Claimant argues that risk was foreseeable

Ms Novakovic contended that:

- She fell within a class of persons who were scared of dogs and who might be expected to visit the premises and react in the manner in which she did.
- Mr and Mrs Stekovic ought to have foreseen that a person, entering the home and in the knowledge that the dog was "dangerous" would, upon seeing the dog, flee the house and could be injured in the course of doing so.
- That risk was not insignificant and a reasonable person would have taken the simple precaution of taking the dog outside.

- Once a "triggering breach" is established, it is not necessary to show that the precise manner of sustaining the injury was foreseeable: see *Chapman v Hearse*.[5]

At trial, the parties accepted that any suggestion that the dog was "dangerous" had only come about after the incident occurred.

Were the occupiers guilty of a breach of duty?

Whether Mr and Mrs Stekovic were guilty of a breach of duty turns on whether the risk in question was one of which the occupiers were, or ought to have been aware.

There was no evidence led in the District Court to the effect that either Mr or Mrs Stekovic were aware of Ms Novakovic's general fear of dogs, let alone that she might react in the panicked manner in which she did to escape it.

The fact that the Stekovic's were prepared to allow the claimant to enter the home while the dog was present suggests that they believed that the dog posed no risk to entrants.

The dog did not behave aggressively

The dog did nothing which could be described as aggressive upon Ms Novakovic's entry into the home. Further, the fact that the dog was a trained hunting dog supported the contention that the occupiers had control over it and in any event, no evidence was led to the contrary.

The Stekovics submitted that Ms Novakovic could have acted in a different manner, such as requesting that the dog be removed from the house.

Ms Novakovic accepted that her reaction in fleeing the dog was a result of her general fear of dogs and not because of anything this particular dog did.

Claimant fails to establish "triggering event"

His Honour found that the claimant's submissions were shaped through the prism of hindsight rather than any foresight.

The claimant had not established the "triggering event" which might place the "slip and fall" part of the incident within the class of foreseeable risk.

On one view, it could be said that the claimant's fall had little to do with the presence of the dog. She left the premises hurriedly and slipped on a wet patio. In other words, she had removed herself from any area envisaged as posing a foreseeable danger before she was injured.

The NSW Court of Appeal agreed with the trial judge's finding that the claimant had not established that the risk of injury was foreseeable. The fall was not foreseeable, nor was the risk of the events which actually occurred foreseeable.

What this means for liability insurers

The decision reinforces that in determining whether a person is negligent for failing to take precautions against a risk of harm, whether the risk was foreseeable is only one plank in the enquiry required by the provisions of the Act.

The common law approach of what a reasonable person might do in the circumstances now involves a consideration of at least the four matters set out in s 5B(2) of the Act.

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Footnotes

1. *Novakovic v Stekovic* [2012] NSWCA 54; BC201201598 (27 March 2012).
2. *Hackshaw v Shaw* (1984) 155 CLR 614; 56 ALR 417; BC8400458.
3. *Vairy v Wyong Shire Council* (2005) 223 CLR 422; 221 ALR 711; [2005] HCA 62; BC200507887.
4. *Thornton v Sweeney* (2011) 59 MVR 155; [2011] NSWCA 244; BC201106403.
5. *Chapman v Hearse* (1961) 106 CLR 112; [1962] ALR 379; (1961) 35 ALJR 170; BC6100100.